LEFTENAN-KOLONEL HARBAJAN SINGH JAGAT SINGH & ORS

v.

AZMI ABDUL RAHMAN

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-01-79-1999]
24 NOVEMBER 2000

ARMED FORCES: *Court-martial - Opinion of judge advocate upon finding of guilt by court - Judge advocate of opinion that accused guilty of lesser charge - Whether judge advocate duty bound to specify lesser charge - Whether failure to do so amounted to misdirection - Armed Forces (Court-Martial) Rules of Procedure 1976, r. 103(5)*

CIVIL PROCEDURE: *Appeal - New points, introduction of - In what circumstances may such points be raised*

The instant appeal turned on the interpretation of r. 103(5) of the Armed Forces (Court-Martial) Rules of Procedure 1976 ('the Rules'). The sole issue was this: if a judge advocate is of the opinion that the accused has committed an offence which is less serious than the one with which he is charged, must the judge advocate, when advising the court-martial under the said rule, specify what other offences the accused may be convicted of. This issue was not raised before the court below.

Held:
Per Haidar Mohd Noor JCA

[1] Generally, appellate courts are reluctant to allow points of law or issues to be raised when they were not raised at first instance. However, there is a discretion to allow a point of law or issues not raised at the court below to be raised on appeal. The appellate court will exercise its discretion when the point raised relates to jurisdiction or illegality and not merely a technicality. As the point raised in the instant appeal related to jurisdiction and the facts were not disputed, the point was allowed to be argued.

[2] Under r. 103(5) of the Rules, it is the duty of the judge advocate to advise that on the evidence presented the accused has committed an offence involving a lesser degree of punishment although he was not charged with it, and what are the lesser offences open to the court-martial to consider. It is not sufficient to merely advise the court-martial to consider again for any lesser charge and to convict the accused on the lesser charge. This is so because the word "findings" in r. 103(5) of the Rules is in the plural.

[2a] The failure of the judge advocate, when advising the court-martial under r. 103(5) of the Rules of its powers to convict the accused on a lesser charge, to mention what other offences the accused could have been convicted of was a misdirection by way of a non-direction.

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan semasa berpaling kepada pentafsiran k. 103(5) Kaedah-Kaedah Prosedur Pasukan Bersenjata (Mahkamah Tentera) ('Kaedah-Kaedah tersebut'). Isu yang tunggal adalah ini: jika hakim peguam berpendapat bahawa tertuduh telah melakukan satu kesalahan yang kurang serius daripada yang mana beliau telah dituduh, adalah harus hakim peguam, ketika menasihatkan mahkamah tentera di bawah kaedah itu, menentukan kesalahan-kesalahan lain yang tertuduh mungkin telah disabitkan. Isu ini tidak dibangkitkan di hadapan mahkamah di bawah.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Pada amnya, mahkamah-mahkamah rayuan enggan membenarkan perkara-perkara undang-undang atau isu-isu dibangkitkan bilanya ianya tidak dibangkitkan pada awalnya. Walaubagaimana pun terdapat budibicara untuk membenarkan sesuatu perkara undang-undang atau isu-isu yang tidak dibangkitkan di mahkamah di bawah supaya dibangkitkan ketika rayuan. Mahkamah rayuan akan melaksanakan budibicaranya apabila perkara yang dibangkitkan itu berkaitan bidangkuasa atau kepenyalahan undang-undang dan bukan hanya suatu keadaan teknikal. Oleh kerana perkara yang dibangkitkan dalam rayuan semasa berkaitan bidangkuasa dan fakta-fakta tersebut tidak dipertikaikan, perkara tersebut telah dibenarkan untuk dihujahkan.

[2] Di bawah k. 103(5) Kaedah-Kaedah tersebut, ianya merupakan tugas hakim peguam untuk menasihati bahawa berdasarkan keterangan yang dikemukakan, tertuduh telah melakukan sesuatu kesalahan yang melibatkan hukuman yang lebih ringan walaupun beliau telah tidak dituduh berhubung dengannya dan apakah kesalahan lebih ringan yang terbuka untuk dipertimbangkan oleh mahkamah tentera. Ianya adalah tidak memadai untuk hanya menasihatkan mahkamah tentera untuk menimbangkannya sekali lagi untuk satu pertuduhan yang lebih ringan dan mensabitkan tertuduh atas pertuduhan yang lebih ringan itu. Ini adalah sedemikian kerana perkataan "keputusan" dalam k. 103(5) Kaedah-Kaedah tersebut adalah berbentuk jamak.

[2a] Kegagalan hakim peguam, ketika menasihatkan mahkamah tentera di bawah k. 103(5) Kaedah-Kaedah tersebut mengenai kuasa-kuasanya untuk mensabitkan tertuduh atas tuduhan yang lebih ringan, untuk menyebut kesalahan-kesalahan lain yang tertuduh boleh disabitkan adalah satu salah arahan melalui ketiadaan arahan.

[Perintah sehubungan itu.]

Case(s) referred to:

A-G for Straits Settlement v. Pang Ah Yew [1934] MLJ 184 ***(refd)***
Central Bank of India v. Guardian Assurance Co Ltd [1936] MLJ 163 ***(refd)***
Hassan & Anor v. Wan Ishak & Ors [1961] MLJ 45 ***(refd)***
Major Ali Zaman Ali Hassan v. Capt Abdul Kadir & Anor [1989] 2 CLJ 643 ***(foll)***
Major Sundaraj v. Lt Kol Abdul Aziz Hanafi & Anor [1987] 2 MLJ 477 ***(refd)***
S Mariappan v. Government of Malaysia [1983] 2 CLJ 124 ***(refd)***

Legislation referred to:

Armed Forces Act 1972, ss. 61(a), 77(a), 87, 88, 120(2)
Armed Forces (Court-Martial) Rules of Procedure 1976, rr. 47(2), 103(3), (4), (5), 105

For the appellants - Ahmad Kamal Mohd Shahid SFC
For the respondent - Karpal Singh; M/s Karpal Singh & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-21-08-91]

Reported by S Dharmendran

JUDGMENT

Haidar Mohd Noor JCA:

The respondent, as the plaintiff in the court below, filed a writ action against the appellants, as defendants, seeking for the following orders:

1. a declaration that the plaintiff's conviction and dismissal from His Majesty's service by the Court-Martial, Kuching, Sarawak on 21 January 1988 is wrong in law and null and void;

2. a declaration that the plaintiff is still an officer of the Armed Force, Malaysia holding in rank of Major;

3. an order that the plaintiff be paid all salaries, allowances and other benefits to which the plaintiff is entitled since 21 January 1988.

4. Damages for unlawful dismissal.

5. Interest.

6. Costs and

7. Any further relief deemed fit and proper by this Honourable Court.

The respondent succeeded in the court below and order in terms of prayers 1, 2, 3, 5 and 6 was accordingly granted. Hence this present appeal before us against the judgment of the learned judge.

In this appeal there was only one ground for us to consider, that is, the interpretation of r. 103(5) of the Armed Forces (Court-Martial) Rules of Procedure 1976 ('the Rules') relating to the general duties of the judge advocate in respect of court-martial proceedings under Part XIV of the Rules.

It was conceded by Mr. Karpal Singh, counsel for the respondent, that the issue of the interpretation of r. 103(5) of the Rules was not canvassed before the learned judge but he argued that he could do so before us as it involved a question of law, and it was a matter for the discretion of this court. Counsel for the appellants objected.

We agree that generally the appellate courts are reluctant to allow points of law or issues to be raised when they were not raised at first instance (see *AG for Straits Settlement v. Pang Ah Yew* [1934] MLJ 184, *Central Bank of India v. Guardian Assurance Co. Ltd.* [1936] MLJ 163, *Hassan & Anor. v. Wan Ishak & Ors.* [1961] MLJ 45. However, there are decided cases to show that there is a discretion in the appellate court to allow a point of law or issues not otherwise raised at the court below to be raised on appeal. The appellate court would exercise its discretion when the point raised relates to jurisdiction or illegality and not merely technical. In this respect, Abdul Hamid FJ (as he then was) in *S. Mariappan v. Government of Malaysia* [1983] 2 MLJ 340 at p. 342 said:

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provision of the constitution and service Regulations.

As we are of the view that the point raised relates to jurisdiction and the facts are not in dispute, we accordingly exercised our discretion and allowed the point or issue to be argued before us.

Mr. Karpal Singh could only rely on this ground as he conceded to the submission of counsel for the appellants that the learned judge got confused on the charges preferred against the respondent and the other accused (Captain Ramly bin Abdul Manaf) in their joint trial before the court-martial. The confusion arose in this way.

Three charges were originally preferred against Captain Ramly bin Abdul Manaf ("Capt. Ramly") namely, under ss. 61(a), 87 and 77(a) of the Armed Forces Act 1972 ("the Act"). As against the respondent, two charges were preferred namely, under ss. 61(a) and 88 of the Act. Before their pleas were taken, counsel for Capt. Ramly raised an objection in respect of charges under ss. 61(a) and 87 of the Act on ground of duplicity. The President of the court-martial agreed and noted accordingly that the second charge should be an alternative charge to the first charge and the third charge should then be as the second charge.

At the end of the prosecution case, the court-martial found Capt. Ramly had a case to answer on the first charge as well as the alternative charge (?) and the second charge. We pause here to say that in our opinion it was wrong for the court-martial to call on Capt. Ramly to answer on both the first charge and the alternative charge. It should be either the first charge or the alternative charge. Anyway this issue is not for our consideration as Capt. Ramly is not before us. In respect of the respondent, the court-martial found there was a case for him to answer on the first charge but not on the second charge and acquitted and discharged him on the second charge.

At the end of the defence case, the court-martial found Capt. Ramly guilty on the alternative charge and the second charge. As for the respondent, he was found guilty on the first charge. Herein lies the confusion. As Capt. Ramly was found guilty on the alternative charge, then the charge against the respondent could not stand as his charge is for abetment of the first charge against Capt. Ramly.

It seemed the judge advocate heard wrongly the judgment pronounced by the court-martial. According to the judge advocate he wrongly heard that Capt. Ramly was convicted on the first charge. The judge advocate apologised to the court-martial. When the court-martial adjourned to deliberate on the sentence, the President of the court-martial confirmed with the judge advocate that Capt. Ramly was only convicted on the alternative charge and he was acquitted on the first charge. In view of this, the judge advocate then invoked his power under r. 103(5) which reads:

> If when the Court announce a finding of guilty or a special finding under either section 114 of the Act or Rule 81(3) the judge advocate is of the opinion that such finding or special finding is contrary to the law relating to the case, he shall once more, but not more than once more, advise the court what **findings** are, in his opinion, **open to them**. The court shall then reconsider their finding in closed court. The record of the proceedings relating to such reconsideration shall be in the form set out in the Thirteenth Schedule to these Rules. (emphasis added)

It would be appropriate, in our view, to reproduce the advice the judge advocate gave to the court-martial:

> I am disagreed in the point that if Captain Ramly is not convicted on the 1st charge that is fraudulently misapplied public property then the court cannot convict accused two, Major Azmi on 1st charge abetting Captain Ramly for fraudulently misapplied the said property.
>
> Since Captain Ramly has been acquitted on this fraudulently misapplication of the said property therefore abetting charge on the said Major Azmi should be dropped.
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> Anyway the court has inherent power to consider again for any lesser charge and under RP47 the court has the power to convict the accused on any lesser charge.
>
> Therefore I would like to direct the court to redeliberate once more again on this point. Thank you.

The court-martial took the advice of the judge advocate and redeliberated. Subsequently the court-martial found the respondent not guilty on the first charge but guilty on the charge under s. 87 of the Act in line with the alternative charge found against Capt. Ramly. The court-martial gave the opportunity to counsel for the respondent to amend his mitigation before passing sentence. Counsel for the respondent made slight amendment in line with the new finding. After due deliberation, the court-martial made an order dismissing the respondent from His Majesty's service.

It would appear that the learned judge in the court below was not properly appraised of the conflicting charges before the court-martial by counsel for both parties. We hope we have set out with some clarity on the conflicting charges earlier on in this judgment. It would then be relevant to quote His Lordship's finding:

> ... I agree that on the ingredients as contained in the charge under section 87, if substantiated, would constitute an offence. But then, as here, the principal offender was acquitted and with regard to the charge against the plaintiff, the words "telah membantu (abetted)" as specified in the charge under s. 61(a) are being repeated in the charge under s. 87.
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> 9. In order to succeed against the plaintiff under section 87, the prosecution must prove the following:
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> i) there must be a finding of guilt against the principal offender (Captain Ramly).
>
> ii) That the plaintiff aided and abetted Captain Ramly in committing the alleged offence.
>
> This the prosecution had failed to prove as evidenced by an acquittal of Captain Ramly. As such, the charge against the plaintiff under section 87 could not stand. In this regard, I do not think r. 47(2) can assist the prosecution.

With respect, had it been brought to the attention of the learned judge that Capt. Ramly was actually found guilty on the alternative charge, the respondent (minus the benefit of r. 103(5)) would in all probability fail in his action. Rule 47(2) clearly gives the power to the court-martial to convict the respondent on any lesser charge.

Be that as it may, the issue for our consideration is the effect of r. 103(5) of the Rules in the proceedings before the court-martial.

We first need to examine the role of a judge advocate *vis-a-vis* the court-martial within the provision of the Act and the Rules.

Section 120 of the Act makes provisions as to the exercise by a judge advocate of his functions at a trial by a court-martial. Section 120(2) of the Act provides for Rules of Procedure as to the effect of advice or rulings given to a court-martial by a judge advocate on questions of law. Rule 103 of the Rules sets out the general duties of a judge advocate. Quite apart from r. 103(5) we should consider also r. 103(3) which reads:

> On the assembly of the court the judge advocate shall advise the court of any defect in the constitution of the court or in the charge-sheet and during the trial he shall advise the court upon all questions of law and procedure which may arise. The court shall accept his advice on all such matters unless they have weighty reasons for not doing so, shall be recorded in the proceedings.

It would appear that unless the court-martial have weighty reasons for differing with the judge advocate, a court-martial is bound to accept the advice of the judge advocate on all questions of law and procedure. The reason for this provision is obvious. The members of a court-martial are laymen in so far as the law is concerned (see s. 105 of the Act) and it is then the legal duty of a judge advocate to advise the court-martial on all questions of law and procedure. In our view the proceedings in a court-martial is akin to the proceedings in jury trials where r. 103(4) imposes a duty on the judge advocate to sum up the evidence and advise the court-martial upon the law relating to the case before the court-martial close to deliberate on their finding (see *Major Sundaraj v. Lt Kol Abdul Aziz bin Hanafi & Anor* [1987] 2 MLJ at p. 477).

We will now proceed to consider the effect of r. 103(5) of the Rules *vis-a-vis* the advice of the judge advocate to the court-martial. In our view, the judge advocate had correctly advised the court-martial that it has the power under r. 47 to convict the respondent on a lesser charge. However, the complaint here is that the judge advocate had failed to direct the court-martial "what findings are, in his opinion, open to them" as provided in r. 103(5). In other words, just like a jury trial, it is the duty of the judge-advocate to advise that on the evidence presented the respondent has committed an offence involving a lesser degree of punishment although he was not charged with it and what are the lesser offences open for the court-martial to consider. It is not sufficient to merely advise the court-martial to consider again for any lesser charge and to convict the respondent on the lesser charge. We say so for the reason that the word "findings" in r. 103(5) is in the plural. Mr Karpal Singh submitted that the failure of the judge advocate to comply strictly with the provision of r. 103(5) amounted to a non-direction and this had caused injustice to the respondent. To that extent, Mr Karpal Singh submitted that the point or issue is one of jurisdiction and the learned judge was correct (though for different reasons) to make the order in favour of the respondent.

We agree that there are merits in the submission of Mr Karpal Singh. In our view the scheme of the Armed Forces legislation clearly demarcates the role of the court-martial as judges of fact and the role of the judge advocate as judge of law. In our view the judge acting under r. 103(5) in

advising the court-martial of its powers under r. 47 to convict the respondent on a lesser charge without mentioning what other offences the respondent could have been convicted of was clearly a misdirection by way of non-direction (see *Major Ali Zaman bin Ali Hassan v. Capt Abdul Kadir & Anor* [1989] 3 MLJ 32 at p. 34).

Though we not agree with the reasons of the learned judge, we however, agree with the order that he made but for the reasons as stated by us.

The appeal was accordingly dismissed with costs. The order of the learned judge affirmed.